lished by the Dr. Miles Medical case and are not likely to be reviewed in the instant cases even though the economic situation is identical. For if the Court feels that it has judged that situation too hastily and is willing to consider price fixing as reasonable under the circumstances presented, it will be able to find a convenient ground for affirming the judgments of the two instant cases in the difference between the method here used and that employed in the earlier cases.

CONFISCATORY RATE REGULATION UNDER THE FOURTEENTH AMENDMENT.—It is well settled in our law that the imposition of confiscatory[1] rate regulations by legislative bodies is a taking of property in violation of the due process clause of the federal constitution.[2] But the United States Supreme Court has not been inclined to state very specifically wherein his taking of property exists. There are two classes of business which are subject to rate regulation by the state: first, business in which it is legal for anyone to engage, which cannot be prohibited or limited to a monopoly by the state, but which is so affected with the public interest that it may properly be regulated[3]; and second, business which is so completely public service and so necessarily monopolistic that no one may engage in it without the consent of the state.[4] In the first class, the right to engage in such business is a right which the law recognizes and of which consequently no person can be deprived unreasonably.[5] Logically, if the state cannot unreasonably prohibit a person from pursuing such business, it cannot indirectly accomplish the same end by requiring rates which force him to withdraw from it by preventing him from making profits. In the second class, a more difficult question arises. Since no one may engage in such business without legislative authority, obviously the legislature may grant such authority on whatever terms it deems proper, and whoever accepts a franchise clearly cannot afterwards complain of the terms specified therein.[6] Thus if a rate specified in a franchise

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[1]The term "confiscatory" is used throughout this note to denote a rate so low that it does not permit to the public service corporation a fair return for its services. As to what constitutes a fair return for its services and the value of the corporate property which forms the basis for determining a fair rate, see 15 Columbia Law Rev. 441.

[2]Reagan *v.* Farmers Loan & Trust Co. (1894) 154 U. S. 362, 14 Sup. Ct. 1047; Minnesota Rate Cases (1913) 230 U. S. 352, 433 *et seq.*, 33 Sup. Ct. 729.

[3]Typical of this class are such businesses as public warehouses, Munn *v.* Illinois (1876) 94 U. S. 113; insurance, German Alliance Ins. Co. *v.* Kansas (1914) 233 U. S. 389, 34 Sup. Ct. 612.

[4]Typical of this class are businesses necessarily using the public ways or requiring eminent domain or other governmental assistance. *Cf.* Minnesota Rate Cases, *supra,* footnote 2, p. 412; Spring Valley Water Works *v.* Schottler (1844) 110 U. S. 347, 4 Sup. Ct. 48; Covington, *etc.,* Turnpike Co. *v.* Sanford (1896) 164 U. S. 578, 594, 17 Sup. Ct. 198.

[5]See German Alliance Ins. Co. *v.* Kansas, *supra,* footnote 3.

[6]Interstate Railway *v.* Massachusetts (1907) 207 U. S. 79, 28 Sup. Ct. 26; see Pulman Co. *v.* Kansas (1909) 216 U. S. 56, 65 *et seq.,* 30 Sup. Ct. 232; Pond, Public Utilities §§ 93, 97. The state is likewise bound by the conditions specified in the franchise. City Railway *v.* Citizens' R. R.

is later found to be confiscatory, the courts will not relieve the grantee. If the franchise grant is permissive only and the grantee has not covenanted therein to give the service authorized, he may prevent loss by stopping operations.[7] Here clearly there is no taking of property. The only legal right of the grantee was to operate on the specified terms; he may still do so if he desires. He is not compelled to suffer any financial loss since he may avoid it by stopping at any time. But where the franchise is in effect a contract and the grantee by accepting covenants to give the services contemplated, he may be compelled to perform,[8] and here a taking of property may take place. In such a case, however, the taking is by due process of law. It is merely a case of where one of the parties to a contract has made a bad bargain.

In franchises where no rate is specified, the right to a reasonable rate is properly implied.[9] If the franchise binds the grantee, this right is a contract right and is entitled to the same protection as any contract right. Or, where the grantee is bound by the franchise to continue service, compelling him to expend property to give such service without just recompense is directly a taking of property in violation of the Fourteenth Amendment.[10] And if the franchise is permissive merely, it is given in contemplation that the grantee will make a considerable outlay of property, and where he does so in accord with his grant, he may insist upon the rights granted therein.[11]

The United States Supreme Court has recently extended the principle of the unconstitutionality of confiscatory rates distinctly beyond such cases. In *Deroit United Railway* v. *Detroit* (1919) 39 Sup. Ct. 151, the franchise of the railway company had expired and for some time the road continued to operate under a sort of day to day agreement with the city, charging the same fare as formerly. Later the company claimed that changed conditions made the old fare insufficient to give it a fair return on its property and raised the fare. The city immediately passed an ordinance forbidding the charge of any fare higher than the former fare. The company sought an injunction against the enforcement of this ordinance, to which the city demurred, and the Supreme Court held the ordinance unconstitutional as a

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(1897) 166 U. S. 557, 17 Sup. Ct. 653; Vicksburg *v.* Vicksburg Water Works Co. (1907) 206 U. S. 496, 27 Sup. Ct. 762. In this connection, a line of cases which hold that the state may, by statute, abrogate terms of a franchise granted to a corporation by a municipality should be distinguished. Since the police power is an attribute of the state, the latter cannot be limited in its exercise thereof by a city unless the state has conferred upon the city the power to do so. And these cases are founded upon the lack of authority of the municipality to exclude by its franchise the rate regulating power of the state. Home Tel. Co. *v.* Los Angeles (1908) 211 U. S. 265, 29 Sup. Ct. 50; Benwood *v.* Public Service Comm. (1914) 75 W. Va. 127, 83 S. E. 295.

[7]Northern Pac. R. R. *v.* Dustin (1892) 142 U. S. 492, 12 Sup. Ct. 273; Potter Matlock Trust Co. *v.* Warren County (Ky. 1919) 207 S. W. 709.

[8]2 Morawetz, Private Corporations (2nd ed.) §§ 1115, 1116.

[9]*Cf.* Chicago, *etc.*, Ry. *v.* Minnesota (1889) 134 U. S. 418, 10 Sup. Ct. 462; Covington, *etc.*, Turnpike Co. *v.* Sanford, *supra*, footnote 4.

[10]Smyth *v.* Ames (1896) 169 U. S. 466, 526, 18 Sup. Ct. 418; *cf.* Northern Pac. Ry. *v.* North Dakota (1915) 236 U. S. 585, 595, 35 Sup. Ct. 429.

[11]See Minnesota Rate Cases, *supra*, footnote 2, p. 434.

violation of the due process clause.[12] The Court interpreted the ordinance as a grant to the company to continue operating and said that the city was thereby compelling the company to give its services without fair return therefor. If the Court meant this literally and technically the dissenting opinion clearly points out the fallacy in such interpretation. If the ordinance were a grant, it could be a grant only on the conditions specified and as these were rejected by the railway company it should not be construed to bind either the city or the company. Admittedly, until this ordinance was passed, the railway company had no right to continue operating except by the permission of the city,[13] and if after the ordinance the city ordered the company to cease running, the city's right to do so could hardly be denied. As to the suggestion of the Court that the city was compelling the company to continue operating at a loss, it seems obvious that the company no longer was bound to continue the service, but could stop running at any time it became unprofitable to continue. And the offer of a so-called grant which the company immediately rejected gave the city no additional power of compulsion.

It is suggested, however, that the Court was taking a broader view of the question than a strict and technical construction of its words would indicate. Taking the relations of the city and the company as a whole, it is evident that the city desired the company to continue its services until a different means of running the street cars was determined upon. The failure of the city to refuse to the company the further use of its streets, or to make any other provision for running the cars, with the result that if the company did not continue to give service a severe injury to the welfare of the citizens must result, and finally the passage of the ordinance, are inconsistent with any other interpretation of the city's intention. And to these wishes, the company acceded, so that it seems fair to say that there was an implied grant by the city of authority to the company to continue service until other arrangements were made, a grant which the company accepted.[14] Under such a construction there seems to be no obstacle in considering the stipulation of the rate a separate and collateral matter and con-

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[12]This decision followed Denver *v.* Denver Union Water Co. (1918) 246 U. S. 178, 38 Sup. Ct. 278, which presented an almost identical situation, and may be taken as establishing the doctrine as one which will be followed. Doherty & Co. *v.* Toledo Rys. & Light Co. (D. C. 1918) 254 Fed. 597, *accord.*

[13]See Detroit United Ry. *v.* Detroit (1913) 229 U. S. 39, 46, 33 Sup. Ct. 697.

[14]Much of the opinion of the court suggests that this was the true basis for the decision. On p. 154, the Court says: "So here, the city might have required the company to remove its tracks from the non-franchised lines within the city. Instead of taking this course the city enacted an ordinance . . . This action contemplated the further operation of the system," and quotes from Denver *v.* Denver Union Water Co., *supra,* footnote 12, "The very act of regulating the company's rates was a recognition that its plant must continue, as before, to serve the public needs." The decision then continues: "It [the city] elected to require continued maintenance of the public service; doubtless because it was believed that it was necessary in the existing conditions in the city to continue for a time at least the right of the company to operate its lines." And *cf.* Doherty & Co. *v.* Toledo Rys. & Light Co., *supra,* footnote 12, p. 605 *et seq.*

sidering the implied grant as general merely and as presuming a reasonable rate. From such a premise the application of established law would make the attempted rate regulation void as depriving the company of its right under its implied franchise. This result is in accord with the principle that a legislative body cannot use its power to prohibit a business as a club to accomplish results which aside from such power would be unconstitutional,[15] and it is believed that this is the underlying theory of the decision.

It is possible that this decision means that a public service corporation has some property right to a just compensation from the very nature of its relation to the public and beyond the technical field of common law or franchise rights.[16] But if this were true, it would seem logically necessary to hold that where a rate specified in a franchise becomes confiscatory as conditions change, the company has the right to increase this rate. It does not seem likely that the Court means to lay down such a novel policy, and so greatly to limit the authority of the legislatures to dictate terms upon which public service corporations may do business.

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[15] Looney *v.* Crane Co. (1917) 245 U. S. 178, 187, 38 Sup. Ct. 85.

[16] Some slight support for this view is gained from the rule laid down in Denver *v.* Denver Union Water Works, *supra,* footnote 12, that the "fair return" should be computed on a basis of the corporation plant as a going concern. But this rule is quite consistent with the theory of a merely temporary right in the corporation. As a general proposition where persons engage in an enterprise for a specified period, they expect to make sufficient profits during that period to offset the loss that a forced sale at the end of the stipulated time will entail and to give them a fair profit on the entire transaction. Theoretically this should be true of a public service franchise and the value of the property at the termination of the franchise should be the value of such property at forced sale. But in practice there are several objections to such a rule. In the first place the stock of the corporation changes hands so frequently that the holders who must bear the losses of a forced sale quite generally are not the holders who reap the profits during the period of service. Moreover, in determining what constitutes a fair return on the property of the corporation, the Court has consistently allowed approximately the earning power of money in that vicinity and has not allowed larger profits to offset the losses of determination of the franchise. *Cf.* Knoxville *v.* Knoxville Water Co. (1909) 212 U. S. 1, 29 Sup. Ct. 148. Finally, the fact that the services rendered must necessarily continue and that either the city itself or another corporation must take up the duties and will doubtless desire to purchase the equipment of the former company gives the latter a different and better means of disposal than would be had at forced sale in open market. A new corporation would pay for the equipment approximately what it would cost to reproduce in its existing condition of wear. And this therefore would be the standard of value in eminent domain proceedings by the city. The Court's rule therefore seems just although the right of the corporation to continue operating is determinable at any time.